STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS SUPERIOR COURT
NORTHERN DISTRICT

DOCKET NO. 02-E-0466

TOWN OF LYNDEBOROUGH

V.

BOISVERT PROPERTIES, LLC, ET. AL.

OPINION AND ORDER

LYNN, J.

The plaintiff, the Town of Lyndeborough (town), instituted this action against the defendants Boisvert Properties, LLC, Barbara Blaisdell Boisvert and Laurent Boisvert (the Boisverts), seeking to prevent them from allowing their property to be used as part of the state trail system for the operation of Off Highway Recreational Vehicles (OHRVs)[1] without first obtaining site plan approval from the town's planning board. The State of New Hampshire (State) , acting on behalf of the department of resources and economic development (DRED), the Granite State ATV Association (association), and a group of the defendants' neighbors (the "near neighbors") were subsequently granted permission to intervene in the case to represent their respective interests. Presently before the court is the issue of whether the town's land use regulations are preempted by the state statute governing OHRVs, RSA chapter 215-A (2000

[1] Under the statutory definition, OHRVs include "snow traveling vehicle[s]" (snowmobiles), wheeled "all terrain vehicle[s] (ATV[s])," and "trail bike[s]." See RSA 215-A:1, I-b, VI, XIII, XIV (Supp. 2002).

and Supp. 2002). I conclude that RSA 215-A preempts the town from requiring the defendants to obtain site plan approval as a prerequisite to permitting public use of trails which have been accepted by DRED as part of the state OHRV trail system, but that the statute does not preclude the town from regulating certain other aspects of OHRV use on the subject property.

The Boisverts collectively own in excess of 500 acres of land in the Towns of Lyndeborough and Mont Vernon. The Lyndeborough portion of this property is located in the town's Rural Lands One (RL1) zoning district. Outdoor recreational uses are generally permitted in the RL1 district, subject to site plan review and approval by the planning board, but campgrounds are specifically prohibited in the district.

In August 2001, the defendants submitted to the town an application for site plan approval to use their property for a commercial recreational area, which would include OHRV trails, a paint ball park, and overnight camping facilities. The planning board denied approval of the campground aspect of the plan based on the zoning ordinance's prohibition of campgrounds. The Boisverts appealed this ruling to the zoning board of adjustment (ZBA) and also sought a variance. The ZBA upheld the planning board's construction of the ordinance and denied the variance. The Boisverts then appealed to this court, which upheld the decision of the ZBA. Boisvert Properties, LLC v. Town of Lyndeborough, No. 01-E-601, Order of June 27, 2002 (Barry, J.). No further appeal was taken.

On July 19, 2002, the Boisverts withdrew the remaining portions of their proposal from the planning board. Thereafter, the Boisverts announced that they

had granted a trail right of way easement to the New Hampshire ATV Club (club) and were listing their property as an open trail with DRED's bureau of trails (bureau). The town selectman informed the Boisverts that, notwithstanding such listing, they were required to obtain site plan approval from the planning board before public OHRV use would be permitted on their property. The Boisverts took the position that the state listing exempted the property from regulation by the town, and they therefore refused to stop clearing trails on the property or allowing the public to access the property for OHRV use. This prompted the town to institute the present action.

A hearing on the town's request for temporary relief was held on October 17, 2002. At the hearing, the parties entered into an agreement, which was approved by the court, under the terms of which the Boisverts rescinded the trail easement they had granted to the club and agreed not to take any further steps to develop OHRV trails on their property pending final resolution of the matter by the court.[2] Thereafter, at a further hearing held on March 24, 2003, all parties agreed that the major threshold issue which needed to be resolved, before the court could address any other matters, was the extent to which, if at all, RSA chapter 215-A preempts town regulation of OHRV use on the Boisverts' property.

[2] As a result of this agreement, the bureau determined to withhold formal acceptance of the Boisverts' property into the state trail system. The near neighbors seize on this point as a basis for claiming that the Boisverts have no grounds for claiming state preemption from local regulation. In effect, the near neighbors argue that the lack of final action by the bureau renders the preemption issue unripe for adjudication. I regard this argument as inconsistent with the near neighbors' agreement, along with all the other parties, that the court should decide the preemption issue at this time as a threshold matter in the litigation. Furthermore, no one has suggested there is any legitimate question that the bureau would accept the Boisverts' property for inclusion in the state trail system were it not for the uncertainty generated by the present litigation. Therefore, I find that there is a live controversy between adverse parties that is capable of judicial resolution by a decision from this court declaring the rights of the parties. It also is true of course that the ruling rendered herein is based on the assumption that the bureau will accept the Boisverts' property into the state trail system once this case has been concluded; should the bureau ultimately decide not to do so, there obviously would be no basis for a claim of state preemption of local regulation.

RSA 215-A establishes a state regulatory scheme for OHRVs that generally covers six areas: use of property for riding, qualifications of OHRV operators, manner of operation, required OHRV specifications and equipment, registration of OHRVs and OHRV dealers, and enforcement. RSA 215-A:2 created the bureau as a component of DRED's division of parks and recreation. The bureau is charged with the responsibility of planning, developing and maintaining the state OHRV trail system, including working with landowners and organized OHRV clubs in obtaining easements and rights-of-way for OHRV use, "promot[ing] the proper use of trails throughout the state, and protect[ing] their integrity for future generations." RSA 215-A:3, IV-a(b); see RSA 215-A:3, II, III. The bureau is authorized to establish trails on state-owned property, RSA 215-A:41, *et. seq.*, as well as on private property, if the landowner has given permission to an OHRV club or to the bureau for such use. See RSA 215-A:29, XI. Under RSA 215-A:23, VI, the bureau provides grants-in-aid monies to OHRV clubs to construct and maintain trails, including trails located on private property. Landowners who give permission for their property to be used as a trail open to the public also are provided liability insurance coverage under a blanket policy purchased by the state. RSA 260:61, II (Supp. 2002).

The State, supported by the Boisverts and the association, asserts that the bureau's acceptance of the Boisverts' property into the state trail system preempts the town from requiring the Boisverts to obtain site plan approval from the local planning board as a condition precedent to public use of the trails for OHRV riding. The town, joined by the near neighbors, disputes the claim of state

preemption and argues that the Boisverts must comply with the town's site plan regulations.

"The preemption doctrine flows from the principle that municipal legislation is invalid if it is repugnant to, or inconsistent with, State law." Casico v. City of Manchester, 142 N.H. 312, 315 (1997) (citing Arthur Whitcomb, Inc. v. Town of Carroll, 141 N.H. 402, 406 (1996)). "Municipal legislation is therefore preempted if it expressly contradicts state law or `runs counter to the legislative intent underlying a statutory scheme.'" Id. The enactment of a detailed and comprehensive state regulatory scheme governing a particular field is a strong indication, albeit not conclusive, of the legislature's intent to preempt that field by placing exclusive control in the state's hands. See Town of Hooksett v. Baines, 148 N.H. 625, 627 (2002). An actual conflict exists when it is impossible for a private party to comply with both state and local regulatory requirements or where local law stands as an obstacle to the accomplishment and execution of the full purpose and objective of the legislature. Cf. Disabilities Rights Center v. Commissioner, N.H. Dept. of Corrections, 143 N.H. 674, 678 (1999) (dealing with federal preemption of state law).

The town advances three basic arguments in opposition to the State's claim of preemption. First and foremost, the town contends that while RSA 215-A addresses a variety of regulatory issues regarding OHRVs, it does not constitute a comprehensive regulatory scheme with respect to the use of land for OHRV purposes. The town asserts, for example, that sixty of the seventy-one sections of RSA 215-A deal with the operation of, equipping of, and ownership of

OHRVs – matters which the town has no interest in regulating. I agree with the town that, at least with respect to the inclusion of private property within the state trail system, RSA 215-A is not as comprehensive as the statutes involved in other cases where the New Hampshire Supreme Court has found local land use regulations preempted. In particular, the town is correct in noting that in many of the cases where the court has found local land use regulations preempted the statute at issue provided a mechanism for public input into the decisions-making process that was at least roughly equivalent to that which would obtain under the local ordinance. See Whitcomb, supra (RSA 155-E); Applied Chemical Technology, Inc. v. Town of Merrimack, 126 N.H. 45 (1985) (RSA 147-A – 147-D); Wasserman v. City of Lebanon, 124 N.H. 538 (1984) (RSA 481 – 482); Stablex Corporation v. Town of Hooksett, 122 N.H. 1091 (1982) (RSA 147-A – 147-D). RSA 215-A contains no similar provisions for public input into the bureau's decision to accept private rights-of-way for inclusion in the state trail system. That the RSA 215-A regulatory scheme is not as comprehensive as it might have been made does not end the inquiry, however. Regardless of the comprehensiveness of RSA 215-A, local regulations are preempted if they either directly conflict with the terms of a statute or their application would frustrate the purpose which the legislature sought to accomplish. See Town of Pelham v. Browning Ferris Indus., 141 N.H. 355, 363 (1996) (citing Stablex, 122 N.H. at 1102). Indeed, RSA 215-A: 15, I specifically provides that "[w]ith bylaws and ordinances any town or city may regulate the operation of OHRVs within its

limits, providing they do not conflict with the provisions of this chapter. (Emphasis added.)

As the supreme court has recognized, one of the primary purposes of RSA 215-A was to encourage landowners to make their property available to OHRV users. See Lorette v. Peter-Sam Inv. Properties, 140 N.H. 208, 212 (1995), appeal after remand, 142 N.H. 207 (1997). This purpose would be completely frustrated if a municipality were free to require a landowner to go through the time consuming and often expensive process of site plan review in order to make his property available as part of the state trail system. It must be remembered that, unlike the regulatory schemes at issue in many of the cases relied on by the town (and unlike the Boisverts' original plan), the present controversy does not arise out of an effort by the Boisverts to develop their property for commercial purposes. Aside from coverage under the state's insurance policy, property owners, such as the Boisverts, who agree to open their land to the public for OHRV use receive no monetary benefit from either the state or the OHRV users.[3] In fact, as a condition of acceptance into the state trail system, the Boisverts are prohibited from charging members of the public a fee to use OHRVs on their property. This is a significant distinction from the proposed commercial developments at issue in cases such as Stablex, Wasserman and Applied Chemical – and one which makes the argument for preemption stronger, not weaker, here than it was in those cases.

[3] As noted previously, state grant-in-aid monies are available for trail development and maintenance on the Boisverts' property, but these monies are provided to the club, not the Boisverts.

In the context of a proposed commercial development of property, it often can be assumed that the financial benefits the developer hopes to realize from the project are such that he will not be deterred from proceeding by the prospect of having to obtain a series of approvals from state and/or local authorities. On the other hand, where, as here, the statutory goal is to encourage landowners to volunteer their property for use as part of the state trail system, it is inconceivable that the legislature could have intended to require the landowner to run the gauntlet of the local site plan review process. Site plan review costs a private landowner time and money to draft a plan, attend meetings, and perhaps hire an attorney or other experts to produce reports or studies that the planning board may require. These burdens would tend to discourage private landowners from gratuitously making their property available to the state trail system, thereby conflicting with the purpose of RSA 215-A. Indeed, it seems fair to say that it would be a rare landowner who would likely open his property to OHRV use if he was told that, as a condition of his beneficence, he was "signing-on" to participating in site plan review by the local planning board.

This same consideration also appears to be the reason the legislature chose not to establish a detailed pre-approval hearings mechanism at the state level prior to the bureau's acceptance of private property to become part of the state trail system. By contrast, under amendments to RSA 215-A which became effective in 2002, a detailed pre-approval process, which includes a public

hearing, is required prior to the establishment of new ATV[4] trails on state owned land. RSA 215-A:41 - :43. Again, given its purpose to insure that the state's trail system for ATVs "[u]ses, to the greatest extent possible, private lands, under voluntary agreements with landowners," RSA 215-A:41, II(a), the legislature undoubtedly realized that to construct a detailed pre-approval process, complete with public hearings and various other requirements, would likely have signaled the death knell for private contributions of land to the system. Contrary to the assertions of the near neighbors, however, it is simply not accurate to say that the state exercises no regulatory control over private property offered for inclusion in the state trail system. For example, the bureau has adopted a manual entitled "Best Management Practices for Erosion Control During Trail Maintenance and Construction." OHRV clubs that receive grant-in-aid monies are required to follow these "best practices" when they construct or maintain trails. In addition, the Department of Environmental Services (DES) retains full authority to enforce state wetlands and other environmental regulations with respect to any areas of the state trail system where such regulations are implicated.

Beyond the inherent conflict between the intent of RSA 215-A and the site review process, it also is clear that recent amendments to the town's zoning ordinance directly conflict with RSA 215-A. Under the statute and its implementing regulations, it is the bureau which has the authority to decide what trail easements to accept to become part of the state trail system. Yet as

[4] The provisions of RSA 215-A:41 - :43 apply only to ATVs, and thus appear not to require compliance with the newly-established approval process prior to the establishment of snowmobile trails on state-owned land.

amended in 2001, the town's zoning ordinance requires the planning board to deny approval for any recreational use that "adversely affect[s] abutting property values," "result[s] in increased noise beyond property lines over and above that normally associated with residential uses," or is "a nuisance to abutting properties." Lyndeborough Zoning Ordinance § 701.00(g)(1), (2), (4). Any of these provisions could afford the planning board a basis for denying site plan approval of the trails which the bureau has determined to accept as part of the state trail system. In addition, the "residential use" noise criteria of the ordinance appears to conflict with the provisions of RSA 215-A:12, which sets forth explicit noise standards for OHRVs.

The town next argues that the legislature's failure to enact certain measures in the recently concluded legislative session demonstrates that the legislature did not intend RSA 215-A to preempt a municipality from applying its site review regulations to private property which a landowner opens to OHRV use as part of the state trail system. Four such measures were apparently introduced in the 2002-03 legislative session, two (HB 152 and HB 748) which would have stated explicitly that local governments have no authority to regulate landowner permission to open private property to OHRV use, one (HB 385) which would have stated explicitly that private land opened to the state trail system must be done in compliance with local ordinances and bylaws, and the last (HB 335) which would have allowed municipalities to enact zoning ordinances requiring a special exception for OHRV use where it "has the potential to affect the use, health or enjoyment of abutters to a property." But, as our supreme court has

noted, "the legislature speaks by action and not by inaction." Wallace v. Wallace, 120 N.H. 675, 679 (1980). The rationale for this view was explained in a recent decision of the United States Supreme Court:

> We have . . . held, however, that failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute, . . . reasoning that [c]ongressional inaction lacks persuasive significance because severally equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change . . . .

United States v. Craft, ___ U.S. ___, 122 S.Ct. 1414, 1425 (2002).

The above analysis is obviously applicable here. It is impossible to say whether the legislature's failure to enact any of the proposed legislation reflects affirmative disapproval of the proposal, on the one hand, or simply a conclusion that the proposal was duplicative of existing law and therefore unnecessary, on the other. Consequently, the existence of these various proposals does not undermine in any way my conclusion as to the proper construction of RSA 215-A in its present form.

Finally, the town makes a half-hearted argument that construing RSA 215-A so as to preempt local site plan review as a prerequisite to allowing private land to be used for the state OHRV trail system violates the unfunded mandates provision contained in part I, article 28-a of the New Hampshire Constitution. Specifically, the town contends that if the Boisverts' property is allowed to be used as part of the state trail system the town will incur increased expenditures – above and beyond what it presently spends – for police, fire, rescue and other services. The argument has no merit. In order for article 28-a to be implicated,

there must be both a state mandate of responsibility to a political subdivision and a requirement of additional expenditure by the subdivision as a result of the mandate. Town of Nelson v. N.H. Dep't. of Transportation, 146 N.H. 75, 78 (2001); Opinion of the Justices (Solid Waste Disposal), 135 N.H. 543, 545 (1992). Neither condition is satisfied in this case. The bureau's acceptance of the Boisverts' offer to open their land to the state trail system does not "mandate" the town to do anything at all – the local legislative body retains complete authority to decide how much funding should be devoted to the town's police, fire and other services. See id. at 547. Furthermore, whatever may be the town's obligations to provide police, fire and other essential services, these obligations existed both before and after the adoption of article 28-a. That the opening of the Boisverts' property may be a development that will require an increase in the level of such services does not change the fact that the responsibility did not arise by virtue of the state's action. See Town of Nelson, 146 N.H. at 79.

For the reasons stated above, I hold that RSA 215-A preempts the town from requiring the Boisverts to obtain site plan review and approval from the planning board before granting permission for their property to be used as part of the state OHRV trail system. This does not mean, however, that the town is completely without power to regulate any aspect of OHRV use on the subject property. The State concedes, for example, that the town retains the right to regulate such matters as the hours during which OHRVs are permitted to be operated on the property, whether and where picnic areas, rest areas or sanitary facilities may be located, and whether to allow special events or commercial

activities to take place on the property. In addition to these conceded items, I see no reason why the town also should not be able to adopt reasonable measures to control the number of OHRVs that are permitted on the property at any given time, to regulate the size and location of parking and other ancillary facilities, and to insure the orderly and safe flow of traffic in and around the property.[5] The town may not, however, apply the set back or similar requirements of its zoning ordinance to determine where trails should be located on the property, since the siting of trails that form the state trail system is committed to the bureau under RSA 215-A. And, of course, any regulatory measures that fall within the town's residual authority must be administered in good faith and without exclusionary effect. See Stablex, 122 N.H. at 1104.

In light of the foregoing ruling, the clerk shall schedule this matter for a further status conference as soon possible consistent with the court's calendar.

So ordered.

July 7, 2003

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ROBERT J. LYNN
Associate Justice

[5] The town and the near neighbors argue that the only way the town will be able to exercise the regulatory authority which it retains is through the site plan review process. I disagree. The inherent problem with the site plan review process is that it places the burden of action on the landowner, and would thereby allow the town to prohibit property from being used as part of the state trail system until the landowner has complied with all of the requirements set by the planning board. On the other hand, limiting the town to regulating via the adoption of "bylaws and ordinances," RSA 215-A:15, I, of general applicability tends to avoid arbitrariness and places the burden on the town to adopt, in good faith and without exclusionary effect, such measures as it deems appropriate to ameliorate those adverse impacts of OHRV use as remain within the town's residual authority.